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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

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In re Golf Partner Co., Ltd.
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Serial No. 87409894
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Matthew J. Sutch of Dority & Manning, P.A. for Golf Partner Co., Ltd.

Jacquelyn A. Jones, Trademark Examining Attorney, Law Office 120, David Miller,
Managing Attorney.

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Before Cataldo, Heasley and Larkin, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Golf Partner Co., Ltd., applied to register NEXGEN (in standard characters) as a mark on the Principal Register, identifying the following goods:

Golf clubs; Golf putters; Golf gloves; Golf bags; Golf balls;
Golf tees; Golf ball markers; Hand grips for golf clubs; Head
covers for golf clubs; Golf accessory pouches; and Divot repair
tool for golfers

in International Class 28.¹

Applicant appeals from the Examining Attorney's final refusal to register under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark

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¹ Application Serial No. 87409894 was filed on April 13, 2017, based upon Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e).

is likely to cause confusion in view of the registered mark THE NEXT GENERATION IN GOLF MATS! (in standard characters) identifying “driving practice mats” in International Class 28.²

Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E.I. du Pont de Nemours & Co. (“DuPont”),* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *In re Majestic Distilling Co.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see In re Azteca Rest. Enters., Inc.,* 50 USPQ2d 1209 (TTAB 1999).

Evidence

In support of the refusal to register, the Examining Attorney introduced into the record the results of a search of AcronymFinder.com, indicating that “NEXGEN stands for Next Generation.” (July 13, 2017 Office Action at 12.).³

The Examining Attorney also introduced into the record the following definition retrieved from Dictionary.com of “next generation” – “pertaining to the next stage of

² Registration No. 5042401 issued on September 13, 2016 on the Principal Register.

³ Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVue docket system.

development or version of a product, service, or technology.” (February 5, 2018 Office Action at 26).

The Examining Attorney further introduced into the record pages downloaded from the following third-party Internet websites, showing Applicant’s goods and the goods identified in the cited registration, or similar goods, offered under the same marks:

CallawayGolf.com and CallawayTag.com offer golf clubs, golf putters, golf balls, golf bags, head covers for golf clubs, golf tees, and driving practice mats. (July 13, 2017 Office Action at 20-26);

DicksSportingGoods.com offers golf clubs, golf putters, golf bags, golf balls, golf tees, divot repair tools, and driving practice mats. (July 13, 2017 Office Action at 27-32);

PGATourSuperStore.com offers golf club head covers, golf tees, divot repair tools, and driving practice mats. (July 13, 2017 Office Action at 33-35);

GolfGalaxy.com offers hand grips for golf clubs, headcovers for golf clubs, divot repair tools, golf tees, and putting/hitting mats. (July 13, 2017 Office Action at 36-38);

RealFeelGolfMats.com offers hitting/putting mats and golf tees. (June 16, 2020 Final Office Action at 100-110); and

ForbGolf.com offers golf balls, divot tools, golf tees, and hitting mats. (June 16, 2020 Final Office Action at 111-118).

The Examining Attorney also submitted three use-based, third-party registrations for marks identifying the goods identified in the involved application and cited registration. (July 13, 2017 Office Action at 114-122).

Analysis

A. Similarity or dissimilarity and nature of the goods

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of

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the goods or services as described in an application or registration,” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

A proper comparison of the goods considers whether “the consuming public may perceive [the respective goods of the parties] as related enough to cause confusion about the source or origin of the goods or services.” *Hewlett Packard*, 62 USPQ2d at 1004. Therefore, to support a finding of likelihood of confusion, it is not necessary that the goods be identical or even competitive. It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

The Examining Attorney’s website evidence demonstrates that at least six third parties offer both the golf clubs, putters, balls, bags, tees, head covers and divot replacing tools identified in the application and the driving practice mats identified in the cited registration, or related putting and hitting mats, under the same mark. We thus find that consumers would readily expect these goods could emanate from the same sources. Internet material is competent evidence of trademark registrability in ex parte appeals. *See In re Bayer AG*, 488 F.3d 960, 966, 82 USPQ2d 1828, 1833 (Fed.

Cir. 2007); *In re Reed Elsevier Props., Inc.*, 482 F.3d 1376, 1380, 82 USPQ2d 1378, 1381 (Fed. Cir. 2007).

With regard to the Examining Attorney's third-party registration evidence, as a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods at issue are of a kind that emanate from a single source. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant argues:

there is no evidence of any of the goods associated with the NEXGEN mark (i.e., Golf clubs; Golf putters; Golf gloves; Golf bags; Golf balls; Golf tees; Golf ball markers; Hand grips for golf clubs; Head covers for golf clubs; Golf accessory pouches; and Divot repair tool for golfers) being marketed or sold under the '401 Registration.⁴

Applicant's argument, while factually correct, is misplaced. It is not necessary for the owner of the cited registration to offer goods identical to Applicant's identified goods. The question is whether the goods are sufficiently related such that, if similar marks are used thereon, consumers are likely to believe that the goods emanate from the same source. *Thor Tech Inc.*, 90 USPQ2d at 1635.

We recognize that consumers may be able to distinguish Applicant's goods from the goods in the cited registration; however, that is not the relevant inquiry. *See, e.g.*,

⁴ Applicant's brief; 6 TTABVUE 8.

Hydra Mac, Inc. v. Mack Trucks, Inc., 507 F.2d 1399, 184 USPQ 351 (CCPA 1975) (“the confusion found to be likely is not as to the products but as to their source”); *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We find that the second *DuPont* factor weighs in favor of likelihood of confusion.

B. The similarity or dissimilarity of established, likely-to-continue trade channels

The third *DuPont* factor concerns “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567).

Because there are no limitations as to channels of trade or classes of purchasers in the recitation of goods in the involved application or cited registration, we must presume that both sets of goods move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers thereof. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

As noted above, the Examining Attorney has introduced evidence that both sets of goods are offered for sale on the same websites. This evidence supports a finding that these goods are offered in at least one common channel of trade, i.e., third-party websites, to overlapping purchasers.

We find that the third *DuPont* weighs in favor of likelihood of confusion.

C. Similarity or dissimilarity of the marks

In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation, and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs.*, 101 USPQ2d at 1721 (citation and internal quotation marks omitted).

Applicant’s mark is NEXGEN in standard characters. The mark in the cited registration is THE NEXT GENERATION IN GOLF MATS! in standard characters. In appearance, the only similarity between the two marks is that NEXGEN is a recognized contraction of “NEXT GENERATION” and shares letters with those words. Otherwise, the marks are somewhat dissimilar due to the additional wording in the registered mark.

The marks are only somewhat similar in pronunciation. Although “NEXGEN” would be pronounced similarly to “NEXT GENERATION,” the registered THE NEXT GENERATION IN GOLF MATS! mark also includes additional wording, which is

pronounced differently.

Applicant argues, without evidentiary support, that “the dominant portion of the ‘401 Registration is ‘GOLF MATS!’”.⁵ The registered mark is a slogan and no portion of it is disclaimed. We find nonetheless that the term “GOLF MATS” is, at best, descriptive of the identified “driving practice mats” if not generic for those goods. While we must consider the marks in their entireties, the “descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.” *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)). As a result, the term “GOLF MATS” in the registered mark possesses less source-identifying significance than the rest of the wording. On the other hand, the evidence in the record indicates that NEXGEN or NEXT GENERATION suggests a new version or next stage of development as applied to the goods identified in the involved application and cited registration. The term “THE” in the registered mark has no source-identifying significance. *See In re Thor Tech Inc.*, 90 USPQ2d at 1635 (finding WAVE and THE WAVE “virtually identical” marks; “addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance.”).

The Examining Attorney argues that the “wording “NEXT GENERATION” is the

⁵ 6 TTABVUE 6.

dominant element of the registered mark because it is the only distinctive wording in the mark and thus more significant in terms of affecting the mark's commercial impression."⁶ We agree with this characterization of the registered mark.⁷ The mark THE NEXT GENERATION OF GOLF MATS! connotes a new version or the next stage of development of golf mats. Applicant's mark more generally connotes a new version or the next stage of development of Applicant's golf clubs, putters, tees and related golfing equipment. Thus, we agree with the Examining Attorney that the marks at issue herein are more similar than dissimilar in connotation.

While the marks NEXGEN and THE NEXT GENERATION OF GOLF MATS! differ somewhat in appearance and sound, the marks are more similar than dissimilar in meaning or connotation and, overall, create similar commercial impressions.

Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion"); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar'" (citations omitted)). Therefore, even if the marks are somewhat different in appearance and sound, it would not necessarily mean there was no likelihood of confusion given

⁶ Examining Attorney's brief, 8 TTABVUE 6.

⁷ The record is devoid of evidence of the relative strength or weakness of the registered mark.

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the similarities in connotation and commercial impression. We find that the similarities in connotation and commercial impression outweigh the dissimilarities in appearance and sound.

This *DuPont* factor supports a finding that confusion is likely.

Conclusion

Having considered all of the evidence and argument of record, we conclude on this record that Applicant's goods are related to those in the cited registration, and that there is sufficient evidence that the goods travel in the same channels of trade to overlapping purchasers. In addition, we find that the marks are more similar than dissimilar, and as result, that confusion is likely.

Decision: The refusal to register under Trademark Act § 2(d) is affirmed.